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Swinomish Tribal Community

A Federally Recognized Indian Tribe Organized Pursuant to 25 U.S.C. § 476

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February 20, 2008

Mr. Richard McAllister
Assistant Regional Counsel
Environmental Protection Agency, Region 10 (ORC-158)
1200 Sixth Avenue
Seattle, Washington 98101

Re: Second Supplemental Submissions in Support of Swinomish TAS Application

Dear Mr. McAllister:

Thank you for visiting the Reservation last week to discuss with us comments received from the State of Washington regarding the Tribe's application for treatment as a "state" for the purpose of administering water quality standards pursuant to Sections 303(c) and 401 of the Federal Water Pollution Control Act ("Clean Water Act"). I write to supplement the Tribe's application with additional evidence supporting the regulatory boundary depicted by the Tribe in various maps submitted in support of the Application (*see, e.g.,* Exhibit 7 to the Initial Application).

The Tribe understands that the Washington Department of Ecology is generally supportive of the Tribe's application but has raised a question regarding the regulatory boundary depicted in various maps submitted in support of the Application. Ecology states that the regulatory boundary depicted by the Tribe and identified in the proposed findings of fact does not match the boundaries in the State's GIS layer for identifying impaired waterbodies of the state. *See* Letter from Jay Manning to Rich McAllister (October 26, 2007)(attached as Exhibit 1). As the Tribe and EPA have discussed this matter, questions have arisen concerning the status of McGlinn Island at the south end of the Swinomish Channel and the status of certain oxbows of land at the north end of the Swinomish Channel. I address each in turn.

I. Mapping Discrepancies.

The regulatory boundary depicted in various maps submitted in support of the Application does not match the boundaries in the State's GIS layer for identifying impaired

waterbodies of the State. The State's 303d layer does not depict the Reservation boundary at all. *See* Map, Ecology 303d Layer (SITC 2007)(attached as Exhibit 2).

The regulatory boundary depicted in various maps submitted in support of the Application also does not match Ecology's tribal boundaries layer. *See* Map, Comparison of SITC Regulatory Boundary with DOE, DNR GIS Data (SITC 2007)(attached as Exhibit 3). It appears to us that Ecology's tribal boundaries layer depicts the Reservation boundary as extending slightly beyond the shoreline – but excluding most of the adjacent intertidal areas - in Turners Bay, Similk Bay, Kiket Bay, Skagit Bay, and along the southern end of the Reservation and as lying along the shoreline – and excluding all of the adjacent intertidal areas – in Padilla Bay and the Swinomish Channel. *See id.* However, as the Tribe's Application and prior supplemental submissions indicate, both state and federal courts have held that the Reservation boundary extends to the line of extreme low water and therefore beyond the shoreline. *See State v. Edwards*, 188 Wash. 467, 470-72 (1936); *Corrigan v. Brown*, 169 F. 477, 480-81 (C.C.W.D.Wash. 1907).

Aquatic parcel data from the Washington State agency responsible for managing submerged lands of the State, the Washington State Department of Natural Resources ("DNR"), also indicates that Ecology's tribal boundaries layer is incorrect. *See* Exhibit 3. However, even the DNR data depicts fewer than all of the tidelands within the Reservation and owned by the United States in trust for the Tribe, as evidenced by the fact that dewatered areas visible in an aerial photograph taken at low (but not lowest low) tide extend beyond the tribally-owned aquatic parcels depicted in the DNR layer. *See id.*

The Tribe wishes to stress that the regulatory boundary of the Reservation extends at least as far as the historical midpoint of the Swinomish Slough, to the extreme low water mark of the southern and western waters surrounding the Reservation, to a line that trends east from the extreme low water mark of Turners Bay, then heads north to the extreme low water mark of Padilla Bay.¹ The Regulatory Boundaries Map, attached as Exhibit 7 to the initial Application, provides a good general representation of the historical midpoint of the Channel and the extreme low water mark on the southern, western, and northern sides of the Reservation based on survey, photographic, and historical data from a variety of sources the Tribe has gathered. However, the actual Reservation boundaries may differ from those depicted in the Regulatory Boundaries Map because the extreme low water mark is not permanently fixed.

II. Status of McGlinn Island at the South End of Swinomish Channel.

EPA has asked whether McGlinn Island at the south end of the Swinomish Channel in Section 1, T. 33N R. 2E depicted as lands within the Reservation regulatory boundary in various maps submitted in support of the Application is in fact within the Reservation.

¹ The Tribe reserves the right to argue that the actual boundaries of the Reservation extend farther than those described herein. For purposes of this TAS application, however, the Tribe is asserting regulatory authority only over those lands and waters within the regulatory boundary depicted in the maps submitted in support of the Application.

McGlinn Island is now a peninsula of land connected by causeway to the Town of LaConner on the east side of the Swinomish Channel. *See* Map, McGlinn Island (SITC 2008)(attached as Exhibit 4). However, this was not always the case.

Although a narrow channel of water may have separated what is referred to today as McGlinn Island from the rest of the Reservation at high tide, the main body of Swinomish Slough as it existed at treaty time and prior to Corps' diking and dredging activities was east of McGlinn Island and the causeway. Very early maps of the Reservation (including an 1854 map prepared and forwarded with the Treaty of Point Elliott by Stevens, the main treaty negotiator for the United States, and an 1856 map prepared by Gibbs, another treaty negotiator for the United States) show McGlinn Island as a peninsula on the southeast end of the Reservation. *See* Map, Perry's (Fidalgo) and Lawrence (Guemes) Island (U.S. Exploring Expedition 1841)(attached as Exhibit 5); Map, Washington Territory West of the Cascade Mountains (Stevens 1854)(attached as Exhibit 6); Map, Western Part of Washington Territory (Gibbs 1856)(attached as Exhibit 7); Map, Swinomish Indian Reservation (Jacobs 1871)(attached as Exhibit 8).

At least a major portion of the causeway connecting McGlinn Island to the Town of LaConner was formerly connected to and part of the Reservation on the west side of the Swinomish Slough. Early charts of the Swinomish Slough show a mudflat spit that extended out from Indian Bay (now called Shelter Bay) in the area under the present-day causeway. *See* Chart of Swinomish Slough (U.S. Coast and Geodetic Survey 1872)(attached as Exhibit 9); Chart of Swinomish Slough (U.S. Army Corps of Engineers 1896)(attached as Exhibit 10). During successive dredging operations, the Corps dredged a channel on the west side of McGlinn Island and straight north through the mudflat spit in front of Indian Bay, cutting off the east end of the spit from the rest of the Reservation and rerouting the Swinomish Slough through the dredged channel. A pile dike was constructed on the east side of the dredged channel and dredge spoils were placed on the portion of the Reservation on the east of the dike. Successive dredge spoils deposits eventually created a land bridge connecting McGlinn Island to the Town of LaConner.

In 1884, Mr. Thomas Benn secured a land grant from the United States that included Lots 9 and 10, Section 1, T. 33N R. 2E (McGlinn Island) pursuant to specified federal statutes, none of which applied to Indian lands. In 1940, Sigrid Dunlop secured a deed to the causeway from the State of Washington. In 1945, Sigrid Dunlop secured a second deed for an approximately 25 acre parcel northeast of McGlinn Island from the State. Subsequent to the purported conveyances to Sigrid Dunlop, however, DNR acknowledged tribal ownership of the causeway and tidelands to the east of the causeway in a 1967 letter to the Port of Skagit County. In pertinent part, the letter states that "the area within the 600 foot strip [described in the 1940 state deed], lying north of the line of extreme low tide, in front of McGlinn Island, included only the bed of the Swinomish Slough and tidelands which were part of the Swinomish Indian Reservation." *See* Letter from Washington State Department of Natural Resources to Port of Skagit County (July 11, 1967)(attached as Exhibit 11).

In 1991, the United States appropriated \$1.6 million dollars in federal funds to correct its erroneous land grant to Thomas Benn and the state's erroneous grants to the Dunlops by compensating the interests of the current property holders and quieting title to McGlinn Island and the majority of the causeway in the Swinomish Tribe. *See* Pub. L. No. 102-154, 105 Stat. 990 (1991). The House Conference Report regarding the appropriations act specifically states that "[f]unds have been provided to acquire in trust the property known as 'McGlinn Island' located in Skagit County, WA for the Swinomish Tribal Community under the condition that it shall be preserved in its natural condition." *See* H.R. Conf. Rep. No. 102-256, at 46 (1991)(attached as Exhibit 12). The McGlinn Island parcels were purchased in 1992. *See* Skagit County Auditor Deed 9212170034 (December 17, 1992)(attached as Exhibit 13); Skagit County Auditor Deed 9212170035 (December 17, 1992)(attached as Exhibit 14); Skagit County Auditor Deed 9212170036 (December 17, 1992)(attached as Exhibit 15); Skagit County Auditor Deed 9212170037 (December 17, 1992)(attached as Exhibit 16). In accordance with the federal appropriation, the parcels were immediately accepted into trust on behalf of the Tribe. BIA title plant records reflect the on-Reservation status of the property. *See* BIA Title Status Reports for McGlinn Island Parcels (2006)(attached as Exhibit 17).

Neither the State nor local government contested the acquisition of McGlinn Island and the majority of the causeway into trust for the Tribe. To the contrary, both the State and Skagit County supported the acquisition, believing that it would quiet title in the rightful owner of the property, the Tribe, and permanently resolve questions regarding the Reservation boundary.² In a 1991 letter to Senator Slade Gorton urging appropriation of funds for acquisition, DNR wrote:

Before the Slough was dredged, the navigable channel for the river was to the east of McGlinn Island. Subsequently, the island and connecting 'causeway' were sold by the state of Washington to the Dunlop family. After being in family ownership for nearly 50 years, the Dunlop family discovered, in trying to sell the property, that there was a cloud on the title because of underlying tribal claims to the island and causeway. These claims were based on the original treaty document and associated map defining the Swinomish reservation boundaries as extending to the original navigable waterway.... By purchasing the ownership interests of the Dunlop family and the other owners, their long-standing rights in the property will be equitably addressed. *Acquisition by the federal government, on behalf of the tribe, will permanently resolve the reservation boundaries.*

See Letter from Washington State Department of Natural Resources to the Honorable Slade Gorton (July 1, 1991)(emphasis added)(attached as Exhibit 18). In 1991, the Skagit County Board of Commissioners passed a resolution supporting acquisition of McGlinn Island by the federal government on behalf of the Tribe, part of which reads, "[b]e it further resolved that the Skagit County Board of Commissioners fully endorses and supports the acquisition by the federal government of McGlinn Island on behalf of the Swinomish Tribe and *its inclusion within the boundaries of the Swinomish*

² The Tribe does not believe that the acquisition permanently resolved all questions regarding the Reservation boundary and reserves the right to argue that the actual boundaries of the Reservation extend farther than the regulatory boundary depicted in various maps submitted in support of the Application.

Reservation.” See Skagit County Resolution No. 12992 (June 3, 1991)(emphasis added)(attached as Exhibit 19).

Based on these historical maps and charts showing McGlinn Island and a majority of the causeway to be part of the Swinomish Indian Reservation and more recent writings by DNR and the Skagit County Board of Commissioners recognizing it to be part of the Reservation, we believe it is clear that the Reservation boundary crosses the Swinomish Channel and encircles the area know as McGlinn Island, as depicted in Exhibit 7 to the Application.

III. Status of Oxbows at the North End of Swinomish Channel.

EPA asked for information regarding whether the oxbows of land presently on the east side of the north end of the Swinomish Channel in Sections 12 and 13, T. 34N R. 2E depicted as lands within the Reservation regulatory boundary in various maps submitted in support of the Application are in fact within the Reservation.

The oxbows are within the Reservation. These lands were surveyed as lands of the Swinomish Indian Reservation in 1874, 1884, and 1919. *See* Survey of the Swinomish Indian Reservation (1874)(attached as Exhibit 20); Survey of the Swinomish Indian Reservation (1884)(attached as Exhibit 21); Survey of the Swinomish Indian Reservation (1919)(attached as Exhibit 22). These lands were allotted to Indians in 1885 or 1897. *See* Map, Allotted and Alienated Lands of the Swinomish Indian Reservation (Loseau 1930)(attached as Exhibit 23); BIA Land Index, Section 12, T. 34N R. 2E WM (Tandy Knight and Charles Paul allotments)(attached as Exhibit 24); BIA Land Index, Section 13, T. 34N R. 2E WM (Charley Isee allotment)(attached as Exhibit 25). Beginning in the 1890s, the U.S. Army Corps of Engineers began surveying, dredging, diking, and straightening the Swinomish Slough to provide navigable access between Skagit and Padilla Bays at low tide.³ *See* Letter from J.R. Savage to Capt. Symons, U.S. Army Corps of Engineers (March 9, 1895)(attached as Exhibit 26). As part of this work, the Corps cut through several of the allotments above-described to reroute the Swinomish Slough, isolating portions of the allotments on the eastern side of the rerouted Swinomish Channel. Prior to making the cuts, the Corps recognized that the land was part of the Swinomish Indian Reservation. *See id.* Although the lands have now passed out of Indian ownership, they are still within the Reservation.

The Tribe shares the State’s desire to develop a constructive working relationship between the Tribe and the State to promote our shared interest in effective environmental protection of waters surrounding the Reservation. The Tribe believes that the evidence discussed above and attached to this letter is the type of “more detailed information” regarding the regulatory boundary depicted by the Tribe that will allow Ecology to update its information. We are happy to meet jointly with EPA and the State to discuss this matter further if that would be of assistance.

³ The Tribe’s Initial Application and email correspondence dated December 6, 2007 mistakenly state that the Army Corps of Engineers began this work in the early 1900s. We regret the error.

Rich McAllister
February 20, 2008
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Please do not hesitate to contact me with any questions or concerns.

Regards,

A handwritten signature in blue ink, appearing to read "Emily Hutchinson", followed by a long horizontal flourish.

Emily Hutchinson
Tribal Attorney